

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 25, 2003

TO : Celeste Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Tishman Realty & Construction Co.
Case 2-CA-34948

Local 79, LIUNA
(Tishman Realty & Construction Co.)
Case 2-CB-19205

These cases were submitted for advice as to whether the Employer and Union have violated Sections 8(a)(1) and (2) and 8(b)(1)(A) of the Act by permitting an individual to simultaneously hold the positions of General Foreman and Union President. We conclude that although the Employer and the Union arguably violated the Act by permitting the individual to function in both capacities, the Region should dismiss the charge, absent withdrawal, because an election officer empowered under a RICO Supplemental Consent Decree has already ruled that this individual's work duties did not render him ineligible to hold the office of Union president.

FACTS

Tishman Realty & Construction (Employer) has main offices in New York City, where it is engaged in the construction and management of real estate. As a member of the Building Contractors Association, Inc., Tishman is a party to a collective-bargaining agreement with the Mason Tenders' District Council, to which Local 79, LIUNA (Union) belongs. The current agreement is for the period 2001-2006, and is signed by Anthony Silveri, as Business Manager of the District Council.

Since 1993, Frank Noviello has been working as a General Foreman for the Employer. This position puts him in charge of laborer foremen at Tishman sites in the metropolitan New York area, and just below Vice-President/General Superintendent Cettina. As described by the Employer, Noviello is a bargaining unit employee whose general duties are to visit the various jobsites and insure that they are clean, safe, adequately-supplied, and adequately staffed, and to relay personnel problems or other problems to Cettina along with recommendations regarding solutions. The Employer asserts that Noviello has no independent authority to hire, fire, or assign employees or

to handle employee grievances on the Employer's behalf. However, employees and foremen have described Noviello's duties as including those activities. For example, laborers and foremen have contacted Noviello directly seeking employment, and Noviello has directed them to jobsites with instructions to let the foreman know that Noviello had referred them to that site. Noviello also has discharged employees, including laborer DiNuzzo, whom Noviello laid off without conferring with management upon learning that DiNuzzo had filed a lawsuit against the Employer regarding overtime. Noviello also has assigned laborers and foremen to various Tishman sites as needed, has arranged for an employee to be given a Christmas bonus when the employee requested one, and has run meetings regarding personnel issues during which he appeared to have authority to make disciplinary decisions.¹

In 1998, Noviello was appointed President of the Union and, in 2000, he was elected to that position. As Union President, Noviello is a member of the Executive Board, which has various powers including the power to appoint Field Representatives. He also presides over general membership meetings, meetings of the Executive Board, and meetings of Local trial boards. He does not give regular speeches at such meetings, but acts as "Chairman" and makes announcements in the absence of other officers. Noviello is not involved directly in collective bargaining with the Employer,² and is not authorized to officially handle grievances for the Union. However, employees state that when grievances concerning the Employer are brought up at Union meetings, Noviello responds by either defending the Employer or asking the employee to speak with him privately after the meeting.³

¹ At one such meeting of the foremen regarding theft from worksites, Noviello stated that any person caught stealing materials would be fired and that any of the foremen who did not like that policy could resign immediately. Noviello also conducted a sexual harassment class for the foremen, and said he would later conduct a similar class for the Union shop stewards.

² As Union president, however, he is automatically a delegate to the District Council, which negotiates collective-bargaining agreements with the multi-employer unit to which the Employer belongs.

³ It is not clear whether, in these post-meeting discussions, he is discussing the grievance on the Employer's behalf or on the Union's behalf.

ACTION

We conclude that although the Employer and Union arguably violated the Act by permitting Noviello to function as both General Foreman and Union President, the Region should dismiss the charge, absent withdrawal, because a court-sanctioned election officer has already determined that Noviello's work duties did not render him ineligible to hold the office of President.

In determining the lawfulness of dual-function situations, the Board examines all the circumstances to determine if the employer unlawfully interfered with the administration of the union through its supervisor's participation in intraunion affairs. In conducting that inquiry, the Board uses the following considerations as a guide: (1) the nature of the supervisory position; how completely the responsibilities of the particular position identify the holder of the position with management; (2) the apparent permanence of the supervisory position; how long the position has been held; how high it is in the company's hierarchy of supervisors; and (3) the extent to which the supervisory position is properly included in or excluded from the bargaining unit.⁴ The Board also considers the nature of the supervisor's alleged participation in intraunion affairs.

In applying the Power Piping test, the Board routinely finds a violation where the dual-function individual has supervisory responsibilities for an employer and is involved in grievance handling or collective bargaining on the Union's behalf vis-à-vis that employer.⁵ On the other hand, the Board does not find a violation where a statutory supervisor participates only in purely internal union affairs, such as voting in an internal union election, that do not involve him in the union's collective-bargaining relationship with his employer.⁶

However, even where no showing of direct involvement in grievance handling or collective-bargaining was made, the Board has found a violation where a supervisor was also a high-ranking union official. Thus, in Ditzler Mechanical

⁴ Power Piping Co., 291 NLRB 494, 497 (1988).

⁵ See, e.g., General Steel Erectors, 297 NLRB 723 (1990), enf'd. 137 LRRM 2466 (7th Cir. 1991); ESI, Inc., 296 NLRB 1319 (1989).

⁶ See Hoyt, Brumm & Link, 292 NLRB 1060 (1989).

Contractors, Inc.,⁷ the Board found Section 8(a)(1) and (2) violations by an employer who permitted a supervisor to serve as president of the local union. Although the supervisor was not involved in collective bargaining or grievance handling for the Union, he exercised general oversight and control as president, which would cause "prudent employees . . . exercising their right to freely engage in union activities without interference from their employer . . . [to] experience some degree of inward restraint."⁸ The Board rejected the employer's argument that the position of union president was simply "ceremonial."⁹

Furthermore, in a dual-function situation no proof of actual interference with an employee's statutory rights need be shown to find a violation. As observed in Nassau & Suffolk,¹⁰ the Board strives to protect employees' reasonable expectation that their union representatives will represent them with "single-mindedness." That expectation is compromised if employees reasonably perceive a potential conflict of interest because of an individual's dual functions.

Here, Noviello clearly is a statutory supervisor with responsibilities that strongly identify him with management. It is a permanent position, and fairly senior in the Employer's hierarchy. With regard to his activities on behalf of the Union, he has the kind of executive oversight authority as Union president that the Board in Ditzler found sufficient to create an untenable conflict of interest. Moreover, although not designated by the Union as having specific authority to handle grievances, Noviello has counseled employees regarding their grievances. Finally, employees reasonably would perceive a potential for a conflict of interest because, although Noviello generally is not involved in dealing with the Employer on the Union's

⁷ Ditzler Mechanical Contractor, Inc., 259 NLRB 610 (1981).

⁸ Id. at 612.

⁹ See also Hoyt, Brumm, and Link, Inc., 292 NLRB 1060 (1989) (no violation where the general foreman's only union involvement was serving as a delegate to the union's national convention; the Board specifically noted that "there is no evidence that [the foreman] has ever served as a member of the Union's governing body or that he has served as a member of a negotiating committee for either the Union or the Respondent").

¹⁰ Nassau & Suffolk Contractors' Assn., 118 NLRB 174 (1957).

behalf, he oversees people who do. Arguably, therefore, the Employer and Union have violated the Act by permitting Noviello to simultaneously hold the positions of General Foreman and Union President.

However, Noviello was elected president in an election held under the auspices of the District Court of the Southern District of New York pursuant to a RICO Supplemental Consent Decree (Decree).¹¹ An Election Officer empowered under that Decree to oversee all aspects of the election, including candidates' eligibility for office, ruled that Noviello's work duties did not render him ineligible to run for office.¹² The Election Officer specifically rejected an allegation that there would be a conflict of interest because of Noviello's supervisory responsibilities if he were permitted to hold both positions.

The district court has concurrent jurisdiction to resolve NLRA issues where they arise as collateral issues in lawsuits brought under other federal legislation.¹³ Thus, deferral to the Board's resolution of NLRA charges is not mandatory where a Section 301 suit and pending charges before the Board present common issues.¹⁴ Moreover, the NLRA does not preclude judicial enforcement of a federal criminal statute that independently prohibits conduct that is arguably prohibited by the NLRB.¹⁵ In U.S. v. IBT, the

¹¹ U.S. v. Mason Tenders District Council of Greater New York, 94 Civ. 6487 (RWS) (SDNY 1994).

¹² The Decree provides that any action or litigation that in any way challenges or impedes the authority of the Election Officer shall be adjudicated before the Court pursuant to the All Writs Act. The Decree also provides that the Court retains "exclusive jurisdiction to decide any and all issues arising" under the Decree.

¹³ See Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 626 (1975) and the cases cited therein.

¹⁴ See, e.g., Local 884 Rubber Workers v. Bridgestone/Firestone, Inc., 61 F.3d 1347, 1356-57 (8th Cir. 1995); IBEW v. Hope Electrical Corp., 293 F.3d 409, 417-18 (8th Cir. 2002).

¹⁵ See U.S. v. Boffa, 688 F.2d 919, 930-931 (3rd Cir. 1982) (RICO mail fraud allegation based on "schemes to deprive an individual of economic benefits that are contained in a collective bargaining agreement," is subject to federal court jurisdiction under RICO).

court held that the NLRB did not have exclusive jurisdiction over claims of nonemployee candidates for union office that their exclusion from the employer's premises violated union election rules promulgated pursuant to a RICO consent decree.¹⁶

The Board ordinarily does not relitigate facts that have already been found by a court of concurrent jurisdiction.¹⁷ Although the Board has decided unfair labor practice issues in matters that involved RICO consent decrees, those rulings have neither conflicted with, nor interfered with, the court proceedings in the RICO case.¹⁸

Here, the court-appointed Election Officer has already ruled on the issue presented by the charge, and the sole basis for issuing complaint would be our contrary factual finding that Noviello's role as supervisor made him ineligible to serve as Union president because it created an

¹⁶ 948 F.2d 98, 105-106 (2nd Cir. 1992). The court reasoned that it had enjoined all members and affiliates of the IBT from initiating any legal proceeding relating to the Consent Decree "in any court or forum in any jurisdiction (emphasis supplied) other than the district court from which this appeal was taken" in order to avoid inconsistent judgments regarding the Consent Decree. See also U.S. v. IBT, Local 707, 907 F.2d 277 (2nd Cir. 1990) (collateral lawsuits filed by union affiliates in other states created significant risk of subjecting consent decree to inconsistent interpretations and court officers to inconsistent judgments).

¹⁷ See, e.g., Jim Walters Resources, Inc., Case 10-CA-22132, Advice Memorandum dated October 30, 1987 (dismissing Section 8(a)(5) charge alleging unlawful unilateral implementation of drug testing program because court upheld arbitrator award finding union waiver).

¹⁸ See United Parcel Service, 318 NLRB 778, *enfd.* 92 F.3d 1221 (D.C. Cir. 1996) (Board's decision that employer violated Section 8(a)(1) was reached after court officer under consent decree concluded that the same conduct violated the election rules, and after district court dismissed employer's post-election appeal as moot because the RICO remedies were limited to the campaign period); Tri-County Roofing, Inc., 311 NLRB 1368 (1993) (ALJ initially postponed its ulp hearing on alleged hiring hall violations pending district court hearing to consider new hiring hall procedures pursuant to RICO decreeship. ALJ then ordered ulp hearing to proceed after district court hearing was indefinitely postponed).

untenable conflict of interest. Such a contrary decision by the Board would directly conflict with the Election Officer's decision and force the removal of a Union president elected under a comprehensive RICO consent decree. Under these circumstances, it is appropriate for the General Counsel to exercise Section 3(d) prosecutorial discretion and decline to issue a complaint.

B.J.K.